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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the United States District Court for the District of Columbia (R. 41-43) is reported in 60 F. Supp. 907. The opinion of the United States Court of Appeals for the District of Columbia (R. 46-69), is reported in 156 F. 2d 821.

Jurisdiction

The judgment of the Court of Appeals was entered June 28, 1946 (R. 70). The petition for writ of certiorari was filed September 27, 1946, and granted October 28, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Is a public utility company[1] entitled, in a declaratory judgment proceeding, to a judicial determination as to whether a State Commission or the Federal Power Commission has exclusive regulatory control over such Company's official corporate accounts[2], when

(a) the Company asserts its willingness to keep two differing sets of accounts in obedience to the dictates of the two Commissions, but alleges that this will satisfy neither Commission, since each demands that the Company's official corporate accounts be kept in the manner specified by it;

(b) the two Commissions insist on divergent and inconsistent action on the part of the Company as to its official corporate accounts;

(c) the Company does not know whether, in the day-to-day keeping of its official corporate accounts, it is following authoritative accounting requirements; and

(d) the Company is placed in very real jeopardy by these conflicting claims of jurisdiction, each implemented by severe criminal penalties?

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[1] Respondent, as a "public utility" and as a "licensee", is subject to the comprehensive jurisdiction of the Arkansas Public Service Commission and also to the limited jurisdiction of the Federal Power Commission in respect of its electric properties and operations. Respondent is an Arkansas corporation. It also owned gas, transportation and steam-heat utility systems.

[2] The official corporate accounts which are here involved were clearly characterized (the soundness of the lower court's characterization of such accounts is recognized by the Federal Power Commission in its *Northern States Power Company* opinion; see pp. 6, 7, 25-27, *infra*) as follows by the court below:

> "There must always be an official recording of figures to represent the actualities of the business, to constitute the genuine record of stewardship, the basis upon which representations are made as to the real results of the utility's operations and its true financial condition in reports to stockholders and to the public, and in financial statements to be submitted to prospective investors or creditors. *Merely to state this proposition is to demonstrate its soundness, since any reasonable mind immediately perceives that actual transactions can be truly reflected by only one set of figures.* A differing set shows only a hypothetical situation, demonstrating the distinction between what is, and what might have been." (Emphasis supplied).

Statement

Petitioners' statement of the case is inaccurate in that it omits, perhaps understandably, certain facts which seem to us basic. These omissions include Petitioners' failure to disclose (a) the impact of the Federal Commission's show cause order on the Company's official corporate accounts and (b) the fact that this litigation could long since have been terminated (pp. 5, 6, *infra*) by any expression of willingness on the part of the Federal Power Commission to accept the offer (thus far ignored) of the Respondent Company to maintain *appropriate supplemental records*, rather than its *official corporate accounts*, in accordance with the requirements of the Federal Commission.

As our statement of the question presented indicates, judicial relief was sought by the Company for the purpose of determining a three-party controversy which arose out of conflicting claims of the Federal Power Commission on the one hand and the Arkansas Commission on the other. Each commission has asserted, and asserts, exclusive jurisdiction with respect to the same subject matter—the Company's official corporate accounts.

The jurisdictional claim of the Federal Power Commission is based upon Section 301(a) of the Federal Power Act and that of the Arkansas Commission is based upon the proviso clause of said Section 301(a) and upon the Arkansas Act which confers comprehensive jurisdiction upon the Arkansas Commission. See Appendices B and C hereto.

As the court below said (R. 50), the Arkansas Commission on June 24, 1944 (Exhibit 2 to the Complaint) "entered an exhaustive and carefully considered order. It determined that it had jurisdiction to prescribe the manner in which the company should keep its corporate books, accounts and records and that the books, records and accounts prescribed by it should be the official corporate accounts and records

of the company. * * *" [The Arkansas Commission's exact language is quoted at page 54 of Petitioners' brief].

The staff of the Federal Commission, *after the Arkansas Commission's order had been issued,* re-examined the Company's official corporate accounts and recommended that the Federal Commission require disposition of amounts in such accounts *at variance with the treatment already given,* and currently being given, those accounts under the mandate of the Arkansas Commission. These recommended dispositions included adjustments through surplus which patently could only be made through the Company's official corporate accounts.

Although (as the court below says) the Federal Commission had before it the Arkansas Commission's order, which had definitely claimed exclusive jurisdiction over the Company's official corporate accounts and had prescribed a prudent investment rate base predicated upon the entries appearing in such accounts, said Federal Commission issued a supplemental order requiring the Company to show cause why it should not make the adjustments in its official corporate accounts recommended by the Federal Commission's staff. As the Federal Commission must concede, those adjustments would obviously violate the order of the State Commission. Among other things, they plainly disclosed the Federal Commission's intent to force adjustments in the Company's official corporate accounts. [See particularly paragraphs (i) and (B) of the show cause order set forth in Note 6 to the opinion below (R. 52).]

After the issuance of the Federal Commission's supplemental show cause order, the Arkansas Commission threatened to prosecute the Company under the provisions of the Arkansas statute and to enforce the penalties therein provided for any failure on the part of the Company fully to comply with all of the terms and conditions of the Arkansas order (R. 15).

In an effort to resolve this jurisdictional dilemma, the Company petitioned the Federal Commission to dismiss its show cause order on the grounds that the Company's primary books of account are subject to the jurisdiction of the Arkansas Commission and that the exercise by the Federal Commission of the jurisdiction attempted to be exercised pursuant to its show cause order would result in an irreconcilable conflict between the two regulatory authorities and would subject the Company to the penalties[3] provided for in the Arkansas statute.

In its motion that the proceedings initiated by the Federal Commission's show cause order be dismissed (referred to at page 6 of Petitioners' brief), the Company made, and has since repeated in its briefs and on oral argument as the litigation has proceeded, this express offer:

> "However, if in the judgment of the [Federal] Commission the records and accounts of the respondent kept as required by the Arkansas Department should not adequately serve the purposes of the Commission with respect to the matters over which it has jurisdiction, the respondent *now offers to maintain supplemental records and accounts in such form and in such manner as will provide the Commission with all information necessary or appropriate for the purposes of the administration of the Federal Power Act.*" (Emphasis supplied) (Pet. Br., p. 78)

We repeat that this litigation could have been terminated literally within a matter of hours after an expression by the Federal Commission of its willingness to accept this offer. However, despite repeated challenges either to accept the offer or to reject it, the Federal Commission has remained,

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[3] In its Appendix A, quoting the "pertinent provisions" of the Arkansas Act, Petitioners' brief omits the provision making each violation a separate and distinct offense and each day's continuance after a first conviction "a separate and distinct offense."

and remains, significantly silent. The offer is now repeated in entire good faith.

The Arkansas Commission claims comprehensive and exclusive jurisdiction over the Company's corporate accounts and records. If the Federal Commission is willing to acknowledge that exclusive jurisdiction on the part of the Arkansas Commission and will accept, for its own purposes, supplemental or memorandum accounts in such form as it shall prescribe, this litigation is at an end. But unless the Federal Commission does an abrupt about-face, it cannot deny that *it* claims jurisdiction over the Company's official corporate accounts. And in that conflict of jurisdiction between the two Commissions lies the very real and actual controversy which made it so patently necessary for the Company to seek a declaratory judgment.

This issue is dealt with definitively in the opinion of the court below (R. 58-60), its abundantly buttressed conclusion having been:

> "• • • it would be unrealistic to entertain any doubt as to whether the federal commission not only claimed, but fully intended to exercise, sole and exclusive jurisdiction over the official accounting records in a manner in conflict with the order already made by the state commission."

Commission Has Taken Definite Position

Petitioners' statements and actions pleaded in the Complaint have been given even more definitive significance by the Federal Commission's Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (NS) 257, entered on July 3, 1946, in which the Commission asserts that it, rather than any state tribunal, has complete and exclusive jurisdiction over the official corporate accounts of every public utility and licensee subject to its authority. In this opinion, the Federal Commission said:

> "The question which may arise by reason of the language used in Applicant's reservation is whether our

> accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee. * * * Awareness of the foregoing fact [a self-serving and unwarranted conclusion on the part of the Commission] caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees.[4] * * *"

We are wholly in disagreement with this declaration by the Federal Commission, but it could hardly have taken a more positive or unequivocal stand. And the *Northern States* opinion is particularly significant in its clear recognition of the obvious fact that every public utility company must have a basic set of corporate accounts. The Federal Commission insists that it is master. The State Commission here asserts that *its* requirements control. Thus the dilemma with which the Company is confronted.

Conflict Irreconcilable in Character

The irreconcilable character of the conflict which has placed the Company under such a distressing cross-fire may perhaps best be illustrated by the strikingly diverse approach of the two commissions to Account 100.5, Electric Plant Acquisition Adjustments. This is the account in which the Company is required to record the difference between (a) the original cost of its electric property (i.e., the cost of such property to the person who first dedicated it to the public service) and (b) the bona fide, arm's-length cost of such electric property to the Company itself.

After having determined that this difference between the original cost and the actual, arm's-length cost of such electric property was $6,947,058.92 (R. 13), the State Commission directed that this amount be recorded in Account 100.5, and declared that such amount *represented value when ex-*

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[4] This language was used by the Federal Commission with special reference to the case at bar, which was singled out in footnote 5 to the Commission's opinion, 64 PUR (NS), at p. 261. This opinion is discussed at greater length at pp. 25-27, *infra*.

pended and at the date of the Commission's order and therefore should not be amortized or otherwise removed from the Company's official corporate accounts (page 23 of Ex. 2 to Complaint). Furthermore, the entire $6,947,058.92 was included by the State Commission in the prudent investment rate base on which the Company is entitled to earn a reasonable return.

On the other hand, the Federal Commission's Staff proposes to remove the $6,947,058.92 established by the State Commission in Account 100.5 and to establish it in Account 108.15 (R. 10) and the Federal Commission's show cause order requires the Company to submit a plan for disposing of the entire amount so to be established in Account 108.15.

The Federal Commission has uniformly construed its system of accounts to require that amounts in Account 100.5 (or in the corresponding Account 108.15) be written off. See *In the Matters of St. Croix Falls Minnesota Improvement Company* and *St. Croix Falls Wisconsin Improvement Company*, 43 PUR (NS) 1, 11 (1942); *In the Matter of The California Oregon Power Company*, 47 PUR (NS) 194, 195 (1943); *In the Matter of The Montana Power Company*, 57 PUR (NS) 193, 226 (1945). In the latter proceeding the Commission said:

> "Consistent with our action in similar cases heretofore decided, therefore, we reject respondent's contention that the amounts should be kept in the accounts indefinitely without diminution by amortization or otherwise."

The merits of this conflict between the accounting treatments of the two Commissions are not in issue here and the District Court was not asked to rule upon them. However, these facts are recited because they show conclusively that the Federal Commission will order adjustments in the Company's accounts at variance with the adjustments required by the State Commission because it (the Federal

Commission) *unfailingly interprets its system of accounts to require such adjustments.*

Counsel for the Federal Commission are challenged to assert that the Commission *has ever* permitted amounts comparable with the $6,947,058.92 here under consideration to remain unamortized on the books of *any* company which it considered subject to its jurisdiction.

As Homer Kripke says in a Harvard Law Review article referred to in Petitioners' brief:[5]

> "The Power Commission has clearly committed itself to the conclusion that all Account 100.5 items which are associated with intangibles shall be amortized in a relatively short period of years by charges to Account 537, where they will appear as income deductions rather than as operating expenses."

Approximately $6,000,000 of the $6,947,058.92 here in question may be said to be "associated with intangibles", although representing bona fide actual investment, and, therefore, there can be no doubt as to the Commission's intentions. Indeed, this particular aspect of the irreconcilable conflict between the Federal Commission and the Arkansas Commission stems directly from the Federal Commission's system of accounts, which has always been interpreted by the Federal Commission to require the writing off of bona fide investment recorded in Account 100.5. Thus the question of whether a controversy exists cannot be said to depend upon facts yet to be found in a hearing held for the purpose of examining the Company's particular accounts.

Realizing that its position is uncertain and perilous and that it will be forced to disobey one of the Commissions and to violate one of the two regulatory statutes, whatever

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[5] Kripke, *"A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107"*, 57 Harv. L. R. 433 and 693, at page 455.

course it may take, and prompted by a desire not to violate any law, the Company complained to the District Court that the two regulatory bodies, by reason of their respective claims, have placed it in an impossible position.

This suit to determine the Company's rights and liabilities provides the two Commissions with an appropriate forum in which to contest their respective conflicting claims of superior jurisdiction. Both Commissions were made parties defendant.

The relief sought is a declaratory judgment: (a) that the Federal Commission does not have the exclusive jurisdiction asserted by it over the Company's official corporate accounts; (b) that the exclusive jurisdiction to regulate and supervise such accounts is vested in the Arkansas Commission; or (c) that, in the event it should be determined that the Federal Commission has the jurisdiction claimed by it, the Arkansas Commission does not have the jurisdiction which it claims and has exercised over said accounts.

The Arkansas Commission entered its appearance[6], answered the Complaint, claimed exclusive jurisdiction over said accounts, and admitted all of the allegations of the Complaint, except that it denied that the Company was, in any event, entitled to a declaration that the Arkansas Commission had no jurisdiction over said accounts. The Arkansas Commission also filed a cross-claim against the Federal Commission setting up its claim of exclusive jurisdiction and seeking a declaration to that effect. Petitioners filed a motion to dismiss, which of course had the effect of admitting the allegations of the complaint. This motion was sus-

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[6] In its written entry of appearance, the Arkansas Commission (then Department) said: "The Department voluntarily submits to the jurisdiction of the court in this cause for the reason that the complaint presents to this court for decision issues arising under the constitution and laws of the United States and the constitution and laws of Arkansas which, if decided adversely to the interests of the State of Arkansas, would destroy one of the fundamental powers of the State of Arkansas * * *" (R. 23)

tained by the District Court upon the theory that it had no jurisdiction of the subject matter of the complaint because Section 313(b) of the Federal Power Act provided the exclusive method for reviewing orders of the Federal Commission. The District Court added that the Company had not exhausted its administrative remedies under the Act (R. 42-43).

Purely Legal Question Presented

Upon appeal, the Court of Appeals for the District of Columbia held that an actual controversy (and justiciable issue) was disclosed, presenting only a purely legal problem, that of interpreting the State and Federal statutes and determining which Commission has exclusive control of the official corporate accounts in question, which entitled the Company to a declaratory judgment. Indeed, one question and one question only was decided by the Court of Appeals, i.e., that the present case "presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute." (R. 61).

Summary of Argument

The question presented—whether, in the circumstances of this case, the State Commission or the Federal Commission has exclusive regulatory authority over the Company's official corporate accounts—is solely a legal question. It patently requires the exercise of the judicial function. It cannot be answered by either of the two warring administrative agencies.

The conflict between the two administrative tribunals is irreconcilable and, far from being speculative or conjectural, it is direct and positive. On the one hand, the State Commission has claimed, and is now exercising, exclusive jurisdiction over the Company's official corporate accounts. On the other hand, the Federal Commission has claimed,

and fully intends to exercise, exclusive jurisdiction over the same official corporate accounts. Furthermore, the position taken by the State Commission as to an item of more than $6,000,000 required by it to be recorded and maintained in the Company's accounts is obviously irreconcilable with the position taken by the Federal Commission as to such items both here and in *every accounting reclassification proceeding* before that Commission.

Neither Commission will yield to the other. Neither is satisfied with the keeping of memorandum or supplemental records for its own purposes, the Federal Commission having completely ignored an offer by the Company to keep supplemental records in whatever form that Commission might require. And the Company may suffer onerous criminal penalties if it fails to obey any order of either Commission.

Judicial determination obviously was necessary and the declaratory judgment sought was an appropriate remedy[7], particularly since the administrative remedy provided by the Federal Power Act is not adequate; indeed, no administrative procedure for determination of the instant controversy is available. Decisions of this Court applying the rule that a private litigant may not be entitled to judicial relief until he has had "prior resort" to an administrative tribunal or has exhausted his administrative remedy clearly are neither controlling nor applicable in the circumstances of the case at bar.

The carefully considered, closely reasoned opinion of Judge Miller, speaking for the court below, should be affirmed.

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[7] As Professor Borchard (Declaratory Judgments, 2d Ed., 1941, pp. 900-901) says, a declaratory judgment proceeding provides the two Commissions with an appropriate forum in which to "contest their respective claims to rights, powers, duties and immunities, each seeking to maintain the superiority of its own claim to advantages or exemptions over that of its adversary."

ARGUMENT

Introduction

In introducing their argument, Petitioners have not only confused certain issues and misapprehended others, but have also, we are sure unintentionally, misrepresented several of the Company's contentions. Therefore it seems necessary to comment on some of their introductory remarks.

On page 15 of their brief, Petitioners, after noting the requirements of Section 301(a), quoting its proviso, and referring to the requirements of the Arkansas law, say that the Company and the court below assumed that both Federal and State statutes apply to the Company's official corporate accounts. It is clear that the court below made no such assumption, for it specifically held that "we are not now concerned with deciding which commission possesses the exclusive right of control which both claim" (R. 47). What the court below did hold, on the other hand, was that the Complaint stated a justiciable issue within the purview of the Declaratory Judgment Act; that the Company was entitled to a determination of the dispute between the State and Federal Commissions; that it was the right and duty of the District Court to take cognizance of the purely legal issue presented for decision; and that it was error to grant the Petitioners' motion to dismiss.

The Company has never assumed that the Federal statute applied to its official corporate accounts in these circumstances, but on the contrary has contended that the Federal statute did not confer upon the Federal Commission any authority over those accounts and records which were required to be kept by and under the authority of the laws of the State of Arkansas. The Company does contend, however, that the Federal Commissioners, by the course of action set out in the Complaint, are assuming power which

was never conferred upon them. The Company does not complain of the impact of the Federal statute, but only of the conduct of the Petitioners assuming to act thereunder.

The Company did not say or imply, either at page 14 of its Brief in Opposition or elsewhere, as asserted by Petitioners (Pet. Br., p. 15), that "if the State's accounting requirements are made exclusive by State law, the proviso in Section 301(a) quoted above 'withholds from the Federal Commission' all power to require the maintenance of different records for Federal purposes." What the Company did say and now repeats was that the "proviso clause becomes operative only when particular accounts or records are required to be kept by or under the authority of a state. *Its then effect* is to withhold from the Federal Commission jurisdiction *over any such accounts or records.*" (Brief in Opposition, p. 14; emphasis supplied.)

The Company has not contended and does not now contend that it may not be required to keep accounts differing from those it is required to keep under the Arkansas law if the Federal Commission so orders, but it submits that those different accounts, kept at the instance of the Federal Commission, may not be treated as its official corporate accounts reflecting its earnings, its investment and its financial condition.

Neither Commission Will Play Second Fiddle

The controversy and conflict with which the Company is confronted arose because neither Commission wanted to play second fiddle. Each wants to be concert master and each definitively asserts exclusive control over the same set of accounts—the Company's official corporate accounts—, claiming the authority to dictate the entries made and currently being made therein. If either Commission had indicated its willingness to accept and be satisfied with a supplemental or memorandum set of accounting records,

there would have been no occasion for this law suit. But since neither Commission was satisfied with secondary records, the Company believes, and respectfully urges, that it is entitled to a declaration as to which Commission has the controlling authority that both now claim.

Petitioners assert (Pet. Br., p. 14) that the Federal Commission has assumed that its authority cannot be limited by State action and that this Court so held in *Northwestern Electric Company* v. *Federal Power Commission*, 321 U. S. 119 (1944). Of course, State action could not limit authority *actually granted by Congress* to the Federal Commission. That is not the issue here. It is: What is the authority which the Congress has conferred upon the Federal Commission under Section 301(a) of the Federal Power Act when construed in the light of state authority exercised under, and conferred by, state law? That question was not decided in the *Northwestern* case. There was no factual predicate for its presentation in that case, because there the action of the Federal Commission did not purport presently to affect or constrain State action within the State sphere of authority, while here the Federal Commission not only proposes to modify or reverse State action but, as alleged in the Complaint, is actually usurping and attempting to exercise power expressly left with the States by Congress.

In the *Northwestern* case, the Court did not determine the effect of the proviso of Section 301(a) relied upon here as giving vitality to the claim of the Arkansas Commission. While in the *Northwestern* case the Court said that State Commission action in the accounting field is subordinated to Congress' appropriate exercise of the Commerce power, that observation falls far short of asserting or attempting to assert the extent to which Congress has exercised that power or what authority, pursuant to its exercise, has been conferred upon the Federal Commission. And such observation obviously may not be construed as giving to the

Federal Commission exclusive or any authority over "*any accounts, memoranda or records which such public utility may be required to keep by or under authority of the laws of any state.*"

The Court is not here concerned with what Congress has the power to do or even with what it might have done. No issue is made of those questions. But the district court, when this matter is returned to it for further action, will be concerned with the force and effect of what Congress *has* done, what authority it *has* conferred upon and what authority it *has withheld* from the Federal Commission and left with the State of Arkansas.

In the *Northwestern* case, no State Commission was claiming or contesting the authority asserted and exercised by the Federal Commission. On the contrary, the regulatory authorities of Washington and Oregon, the only state agencies which might have complained, filed briefs *amici curiae* in the Circuit Court supporting in every respect the contentions made by the Federal Commission and opposing those made by the Northwestern Company.

State Commission Has Broad Powers

Petitioners suggest (Pet. Br., pp. 17-18) that, in determining the powers and claims of the two Commissions, consideration should be given to the relation of the Federal Commission's accounting functions to the dividend, merger, security issue and rate provisions of the Federal Power Act and to the accomplishment of the independent objective of regulation "by the informatory process".

Petitioners erred in implying that the Federal Commission has power to regulate the issuance of securities by Arkansas utilities which are Arkansas companies. Since Arkansas specifically authorized its Commission to regulate such securities, their regulation is withheld from the Federal Commission by Section 204(f) of the Federal Power Act to the same extent and in the same manner that

regulatory power over accounting records subject to state authority is withheld from the Federal Commission by the proviso clause of Section 301(a).

Furthermore, the Arkansas Commission has all of the powers which Petitioners mention in Note 13 at page 18 of their brief, as well as very real additional powers, the most significant of which is its plenary power over the Company's earnings, substantially all of which are derived from intra-state sales of electric energy (R. 50).

In view of the broad, comprehensive regulatory powers conferred upon the Arkansas Commission, there obviously is reason why the courts, when they consider the intent of Congress and finally determine which Commission has the power both now claim, should determine that the relation of the accounting functions of the Arkansas Commission to its other and comprehensive powers is emphatically more significant than the relation of the accounting functions of the Federal Commission to its more abridged, more truncated powers.

We submit that the policy underlying the amendments made to the Federal Power Act in 1935 and their legislative history show that the Congress was moved to insert the vitally significant proviso in Section 301(a) out of respect for *"state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed."*[8]

I

This is a Case of "Actual Controversy" Cognizable by the District Court under the Declaratory Judgment Act.

Petitioners' statement of the "actual controversy" at page 33 misapprehends the real issue and brings the controversy within too narrow a compass when it states that

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[8] See Mr. Justice Jackson's interesting discussion of this theory in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 530 (1945).

we are concerned merely with conflicting claims of "an exclusive right to require classification and adjustment of 'write-ups' and other excesses over original cost in respondent's capital accounts." To the contrary, the actual controversy arises out of conflicting claims as to authority over those accounts which are deemed to be the Company's official corporate accounts. The facts recited in the Bill of Complaint as to the classification and disposition of amounts in Account 107 and Account 100.5, the so-called adjustment accounts, do not define the issue. They were included solely for the purposes of showing both the existence of an actual conflict and the impossibility of having dual controls over the official corporate accounts of a utility company.

Petitioners' basic premise is that "until the administrative process has been completed, the impact of the [Federal] Commission's accounting authority is obviously too contingent, speculative, and conjectural to present any justiciable issue" (Pet. Br., p. 33).

If we disregard Petitioners' attempt to narrow the scope of the controversy to a conflict merely as to adjustments required to be made in Accounts 107 and 100.5, and look at the real issue—control over the Company's official corporate accounts—the conflict between the two Commissions becomes actual, positive and anything but contingent, speculative or conjectural.

Federal Commission Intended to Control Corporate Accounts

The Complaint, after describing various actions of Petitioners, alleges (paragraph 23) that, in issuing their show cause order (Ex. 7 to the Complaint), Petitioners unlawfully sought to exercise power and authority not conferred upon them by Congress and intended to control and direct

the recordation of entries in the Company's official corporate accounts (R. 11).

This allegation is supported by allegations of facts in the preceding paragraphs 21 and 22 of the Complaint, and by the text of the Federal Commission's show cause order (Ex. 7 to the Complaint), all of which support the general allegation. Paragraph (B) of that order reads as follows:

> "The Company shall file a response, under oath, within sixty days after the date of this order, to the recommendations contained in the supplemental report herewith to be served upon the Company, including a plan for disposition of amounts in the adjustment accounts. In such response the Company shall set forth any amounts disposed of since December 31, 1936, which are recommended for classification by the staff in Accounts 107 and 108.15 together with the manner in which such disposition was effected" (Pet. Br., p. 68).

The recommendation of the Federal Commission's staff set forth in paragraph (i) of its show cause order is that charges of more than $9,000,000 be made to earned surplus or capital surplus.[9]

Thus it was obvious that any plan for making "disposition of amounts in the adjustment accounts" was intended to apply to the Company's official corporate accounts. No charge could be made to capital surplus, for example, except in the official corporate accounts, because capital surplus could not conceivably be created, for that or any other purpose, upon mere supplemental or memorandum accounts. This is recognized by the Federal Commission itself in its *Northern States* opinion, *infra*, pp. 25 to 27. It therefore is clear that, in relating the Commission's show cause order to its own basic corporate books of account, the Company

[9] As a practical matter it was apparent that most of the charges would have to go to capital surplus, since the Company's earned surplus was relatively small (Ex. 2 to Complaint, p. 31).

was not "attributing any untoward significance" (Pet. Br., p. 35, footnote 27) to that order.

The Company kept only one set of official corporate accounts, in which the adjustments ordered by the State Commission have been recorded (R. 7), and the show cause order (Pet. Br., p. 65) neither excludes those accounts from its impact nor indicates that supplemental records set up for the use of the Federal Commission might be acceptable to it. Furthermore, the show cause order requires the Company to submit a plan for the disposition of amounts in the adjustment accounts and to set forth all amounts disposed of since December 31, 1936. Thus the allegation of the Complaint that the Federal Commission, by issuing its show cause order, is asserting exclusive jurisdiction over the same records claimed by the State Commission to be within *its* exclusive jurisdiction, becomes more than prophecy, conjecture or mere speculation, for the reason that the very items dealt with in the show cause order were necessarily to be recorded in the very records over which the State Commission claims and has exercised exclusive jurisdiction.

The court below was not required to rely on past decisions of the Federal Commission, since that Commission's intent is clearly shown by its said show cause order and was adequately pleaded. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), referring to the possibility of diverse interpretations of various contracts, clearly is not in point.

The rule stated in *Cohen* v. *United States* (C.C.A. 8th, 1942), 129 F. 2d 733 (Pet. Br., p. 35) becomes immaterial when, as is the case here, proper grounds adequately support the challenged decision. The following statement in that decision is, however, pertinent to the instant case:

> "• • • When a motion to dismiss is interposed the complaint must be construed in a light most favorable

to the plaintiff, and it should not be dismissed if it is reasonably conceivable that at the trial the plaintiff might establish a cause of action."

That the Petitioners did intend to exercise control over the Company's official corporate accounts is also made evident by the fact that Petitioners in effect refused (and certainly have ignored) the Company's offer "to maintain supplementary records and accounts" for the Federal Commission, *supra*, pp. 5, 6. The Company is not seeking to restrain and, of course, is not entitled to restrain the Federal Commission from holding a hearing or making a reclassification of the Company's accounts or obtaining other information required for such Commission's administrative purposes. The Company merely seeks to prevent the recordation of the reclassification adjustments resulting from such hearing in its official corporate accounts. Its offer to keep a memorandum set of records reflecting any reclassification of accounts ordered by the Federal Commission, so long as they are not recorded in any accounts which the Company must keep by or under the authority of the laws of the State of Arkansas, still stands.

We find it impossible to believe that Petitioners have not intended, and do not now intend, to claim control over the Company's official corporate accounts as alleged in the Complaint, or that such a course is not made apparent by their actions as pleaded. Furthermore, since Petitioners have plainly construed the Act to require that they exercise this control, it should have been apparent to the District Judge that he need not wait for the impact of further Commission action; for, if the Act has the meaning which they ascribe to it, Petitioners could not waive its requirements and the controversy could be settled only through exercise of the judicial function.

The facts adverted to constituted sufficient support for the general allegation of intent. The court below was not

required to rely upon the Federal Commission's "consistent adherence to the original cost standard in its prior decisions"; but was fully justified in relying upon the "position taken by the Commission's staff in the reports served on respondent" and "the unmistakable tenor of the Commission's order serving the supplementary staff report", referred to at pages 34 and 35 of Petitioners' brief.

Petitioners next contend that there is no support for the conclusion that one authority and only one could so control the keeping of the Company's official corporate accounts that the exercise of such control by one authority necessarily excludes its exercise by the other. This conclusion is one of fact which is adequately pleaded in the Complaint (R. 15, 16).

The facts relied on clearly reveal an exercise of power by the State Commission which excludes action by the Federal Commission in respect of the Company's official corporate accounts. The State Commission directed that the corporate books, accounts and records, reflecting the classification of accounts ordered by that Commission, "shall be the official corporate accounts and records of the company" (Pet. Br., p. 54). The Complaint, in addition to pleading basic facts, alleges:

> "* * * From the entries recorded and set forth in said primary, dominant and principal books of accounts the plaintiff must, from time to time, compile and circulate, for the information of its bondholders, preferred and common stockholders, and the public, annual statements, and the said entries recorded in said books provide the basic data for the payment of bond interest and the declaration of dividends under the laws of the State of Arkansas.
>
> "For the purposes aforesaid, the plaintiff cannot have two sets of books of accounts containing different, conflicting entries" (R. 15, 16).

The fact that there can be but one set of accounts for such purposes is well pleaded as a conclusion of fact and must be accepted as true for all purposes of the motion to dismiss. Petitioners argue that the Arkansas statute does not purport to establish any exclusive system of accounts and that the Arkansas Commission's order does not contain any language of exclusion. But the Arkansas statute does authorize the State Commission to prescribe the accounts to be kept by a subject utility in language which is fully as broad and comprehensive as the grant of authority found in the Federal Power Act and which contains no proviso or exception whatsoever. Acting pursuant to such authority, the State Commission *did* prescribe and direct that the official corporate accounts of the Company should be kept in accordance with its system of accounts. Petitioners, at page 41 of their brief, include an excerpt from the State Commission's order with a statement that the jurisdiction referred to had regard to utility rates. Replacing this excerpt in its context, the full statement in the order reads as follows:

> "Respondent is an Arkansas corporation and is engaged exclusively in intrastate business. The Department has jurisdiction to 'establish a uniform system of accounts' to be kept by Respondent and to 'prescribe the manner in which such accounts shall be kept'. The Department, therefore, finds that it has jurisdiction to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed by this Department shall be the official corporate accounts and records of the Company. Its jurisdiction over Respondent and its electric and other operations is complete and comprehensive and the Department is the only regulatory authority having such all-inclusive jurisdiction" (Pet. Br., p. 54).

The language used by the State Commission can have no other meaning than that its jurisdiction over the Company's official corporate accounts is and should be exclusive.

Only One Regulatory Authority Can Control Corporate Accounts

It is axiomatic that a utility's official corporate accounts cannot be made subject to more than one over-all control. As a matter of common knowledge, ordinary business practices compel a corporation to report to its stockholders and prospective investors and, in such reports, to produce certain and definite figures showing net worth and net income.

The term "official corporate accounts" is used to designate that set of accounts which the Company and others consider as reflecting the general status of the Company's financial affairs—its financial condition as related to the basic and primary purpose for which accounts are kept—a record of its stewardship for the beneficial owners so that the corporate entity, as their agent, may render a report. The importance of understanding the distinction between such official corporate accounts and the broad range of accounts which a corporation may desire or may be compelled to keep, or the specialized accounts kept for particular information or purposes,[10] cannot be overemphasized. Certain of the reported cases dealing with accounting indicate confusion as to this distinction, or even a complete lack of understanding of it. Companies have various supplementary accounts, kept in accordance with differing regulatory requirements, which may proceed upon different bases and produce diverse results. But it must be completely apparent that, in the use of accounting processes to report upon its stewardship, a corporation cannot present varying conclusions as to net worth or net income and, in effect, say to all of its owners and prospective investors that each may choose whichever of the various figures he desires. Accounting for stewardship obviously is the primary objective

[10] Other and special sets of accounts, or partial sets for particular purposes, commonly are kept to supply information for federal income taxes, state income taxes, state or federal insurance contributions and numerous other purposes.

in corporate accounting. Corporations cannot endure without it. Such basic accounting existed before the various and diverse requirements of income and other tax or regulatory needs appeared and it will, of necessity, continue although each of these other exactions may disappear.

Federal Commission Has Recognized Distinction Between Corporate and Other Accounts

Petitioners cannot maintain their contentions in the face of positive statements made by the Federal Commission itself in its Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (N. S.) 257 (1946), *supra*. These positive statements were not made as findings upon evidence. They clearly show that the proposition which the Company and the Court of Appeals considered fundamental was so recognized and considered by the Federal Commission. In its opinion, the Federal Commission, being apprehensive that a reservation made by the Northern States Company in respect of a plan of disposition disclosed an intention to comply with the Commission's requirements in memorandum accounts only, stated:

> "It is not clear from the above language whether the Company, at some time in the future, intends to maintain its corporate accounts with respect to the plant acquisition adjustments in a manner different from the requirements of the Uniform System of Accounts and our order in this proceeding, or if it merely entertains the desire to set up memorandum accounts for the purpose of keeping a record of the amounts which it now proposes to write off. By reason of this lack of clarity we deem it appropriate to set forth our views on the question which may be inherent in this reservation. Section 301(a) of the Federal Power Act authorizes this Commission to prescribe a system of accounts and requires public utilities and licensees to keep their accounts, books, records, etc., in accordance therewith. Our comprehensive authority and jurisdiction in the matter of accounting was settled by the Supreme Court in the *Northwestern* case.

"*The question which may arise by reason of the language used in Applicant's reservation is whether our accounting requirements control the fundamental or basic corporate books of account of a public utility or licensee.* We have previously considered this identical matter. In the *Northwestern* case, where the utility maintained that the Commission's authority was limited to the prescription of memorandum accounts, we said:

> 'In view of the provisions of the Federal Power Act and the decisions of the United States Supreme Court, there can be no doubt about our authority to require the company to keep general corporate and other fundamental accounts and records covering its entire electric utility business in conformance with the provisions of our system of accounts.'

* * * * *

"If public utilities and licensees are permitted to reflect in their basic corporate books of account *entries at variance* with those required under the Uniform System of Accounts prescribed by this Commission, or our orders issued with respect thereto, the way would be immediately opened for a return to the accounting abuses revealed by the Federal Trade Commission's investigation.

"Awareness of the foregoing fact caused Congress to provide that our accounting authority be comprehensive and extend to the basic books of accounts of public utilities and licensees. This authority is set forth specifically in Section 301 of the Federal Power Act and is supplemented by other provisions of the Act, including Section 302 which deals with the fixing of depreciation rates and accounting for depreciation, Section 305 which prohibits the payment of dividends from funds includible in capital account, and the provisions of Section 203 dealing with consolidations and mergers. Frequently the most important question presented in consolidation and merger proceedings relates to possibility of introducing inflation in the plant accounts and the capital structure, and this the Com-

mission would be unable to prevent if the utility's basic corporate accounts are not kept according to its orders. In other words, if the corporate accounts in respect to the capital, surplus plant and depreciation in particular, are not kept according to this Commission's requirements, important provisions of the Federal Power Act will be rendered nullities.

"Of course, public utilities and licensees may keep *such other supplementary and memorandum accounts* as well as subdivisions of the accounts prescribed in our uniform system, as may be necessary or appropriate, provided that the integrity of our uniform system, an essential element in the administration of the Federal Power Act, is not impaired.

"Therefore, Northern States Power Company *is required to reflect the entries prescribed by our order herein on its fundamental corporate books of account,* and we will consider any failure to do so a violation thereof." (Emphasis supplied).

These positive assertions as to what the Federal Commission believes to be its comprehensive accounting jurisdiction are not directed to "the quasi-legislative act of prescribing accounting requirements" (Pet. Br., pp. 44-45), but to the intent of Congress in enacting Section 301(a), which obviously is a question for judicial decision.

How can the Federal Commission argue, within the rule of *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), that its final order may be "of such a character as not to affect" the Company's official corporate accounts? No findings of facts or exercise of technical judgment by an administrative body are required to determine or shape the question presented. Nor is any attempt made to review an interlocutory or procedural order, as in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938), or *Aluminum Company of America* v. *Federal Power Commission* (C. C. A., Dist. Col., 1942) 130 F. 2d 445 (1942). The fact that the Company's petition ask-

ing the Federal Commission to limit the issues framed by its show cause order, so as to eliminate the claim of comprehensive accounting jurisdiction which the Federal Commission would now evade, has not been ruled upon by that Commission does not support Petitioners' position. That petition was filed at an intermediate stage in the Federal Commission's proceeding, but its significance lies in the opportunity—ignored by the Commission—which it presented for clarification of the issue here involved.

Petitioners contend that their position (taken in their motion to dismiss) that the Federal Commission's accounting authority "is not affected by any accounting requirements prescribed under State law" (R. 40) is consistent with the position assumed in their brief: that they had made no claim to control which would exclude State supervision because they left open "the technical accounting question whether it is factually possible for both federal and state agencies to regulate the fundamental corporate accounts if disparate entries are prescribed" (Pet. Br., p. 39).

To the contrary, we submit that the position assumed by Petitioners in the District Court denied efficacy to the proviso clause in Section 301(a) of the Act. The plain intent of the proviso clause is to remove from the jurisdiction of the Federal Commission any accounts and accounting records which a public utility is required to keep by or under authority of the laws of any State. The Bill of Complaint was not directed to accounts generally, but to certain accounts herein referred to as the official corporate accounts, and Petitioners recognized (in their motion to dismiss) the issue which they would now evade. *State Farm Mutual Auto. Ins. Co.* v. *Duel*, 324 U. S. 154, 159-160 (1945), does not support the proposition to which it is cited at page 40 of Petitioners' brief. That case did not involve conflicting claims of different authorities. The only disparity discussed was in respect of financial requirements or standards imposed in admitting foreign corporations to do busi-

ness within a state. The question was whether, in granting qualification to foreign insurance companies, a state could require that certain standards be met by the company's reserves, computed in a prescribed way which differed from the method usually followed by the company. There was no requirement of disparate entries in the company's corporate accounts, but only a requirement that, in the annual statement specified by the qualification statute, the reserves be computed in a particular way.

The facts recited conclusively show that each Commission asserts and seeks to exercise exclusive control over the Company's official corporate accounts. The contention that any differences between the Commissions "are not now ripe for judicial consideration" (Pet. Br., p. 42) is unwarranted. The case is actual and concrete; the controversy is immediate and irreconcilable; and it admits of immediate and definite determination by declaratory judgment, unlike *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412 (1937). The controversy here clearly is an "actual controversy" as that term is used in the Declaratory Judgment Act. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227 (1937). And the challenged action is "sufficiently imminent and certain to justify the intervention of a court of equity"; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34 (1934).

II

The Questions Raised by the Complaint Can Not be Decided by the Federal Power Commission and Should Have Been Decided by the District Court.

Petitioners assert (Pet. Br., p. 19) that in this proceeding the Company is seeking to obtain in advance of an administrative hearing a judicial determination of some of the issues upon which the Federal Power Commission must necessarily pass and that the decision of the court below is

at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. Petitioners further argue that under a statute such as that here involved, the rule requiring exhaustion rests not only upon the principle of "judicial administration" but upon "the specific statutory scheme providing for an administrative determination of all matters in the first instance, prior to judicial review." In support of these contentions, Petitioners rely upon *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

General Considerations

Prior to the insertion in the enabling acts creating various administrative agencies of comprehensive provisions controlling the manner in which litigants may secure judicial redress from allegedly erroneous action by the administrative agency in question, the courts had developed two doctrines with respect to this matter.[11]

One such doctrine, the "doctrine of prior resort" (also denominated as the "doctrine of exclusive administrative jurisdiction" or the "primary jurisdiction rule"), which is commonly said to have had its inception in *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), is to the effect that it is necessary to resort to the appropriate administrative tribunal prior to going to the courts for relief, in the event of controversies falling within the general area of such tribunal's statutory power. As will be more fully developed later, this doctrine was derived

[11] See Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 Minn. L. Rev. 560 (1941); McAllister, *Statutory Roads to Review of Federal Administrative Orders*, 28 Calif. L. Rev. 129 (1940); Note, 51 Harvard L. Rev. 1257.

from an interpretation of the various enabling acts. Since Congress had set up an expert administrative body to perform an appointed task, and since it was felt that uniform regulation of the subject matter could be obtained more satisfactorily by the administrative agency than by the courts, it was said that litigants, before coming to the courts, should be required first to resort to the administrative agency.

The second doctrine of general application which was developed in this field is usually denominated as the "doctrine of exhaustion of administrative remedies." Under this doctrine, a litigant is required to exhaust all available administrative remedies before turning to the courts for relief. As will be shown in more detail later, this doctrine, which appears first to have been announced in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908), is essentially judge-made and is one of judicial self-limitation and self-restraint. It arose out of the desire to extend comity to the administrative agency in question and also was prompted by the desire to insure orderly administrative procedure.

Subsequent to the development of these two doctrines, apparently in order to give the force of statutory law to the prior *practice* of the courts under such doctrines and to prevent undue interference with administrative action by the courts, Congress inserted in certain enabling acts express provisions giving to the administrative agency created thereby exclusive jurisdiction over the subject matter with which it is concerned and providing for exclusive review of the agency's action by designated reviewing courts. For example, the National Labor Relations Act contains provisions of this type. Where such statutory provisions appear, it would seem that the matter is at an end and that there is no occasion to resort to the essentially judge-made doctrines outlined above; see 28 Calif. L. Rev. 129 at 155, *supra*.

Statutory Provisions Not Controlling Here

It may be that Petitioners are arguing that the considerations which are persuasive under statutes like the National Labor Relations Act also are persuasive here. If so, their argument is not well taken, since the Federal Power Act does not provide that the Federal Power Commission's jurisdiction over the subject matter with which it deals is exclusive. The *Myers* and *Waterman* cases, relied upon by Petitioners, are distinguishable on this ground, among others, since in those cases the jurisdiction of the administrative agency involved was made exclusive by statute, whereas that clearly is not true of the Federal Power Commission.

The *Myers* case was a suit in equity to enjoin the National Labor Relations Board from conducting a hearing involving allegedly unfair labor practices. The theory of the complaint was that the plaintiff was not engaged in interstate commerce and for that reason was not subject to the provisions of the Labor Act. In denying the power of the district court to entertain the suit, this Court said:

> "The district court is without jurisdiction to enjoin the hearing because the power 'to prevent any person from engaging in any unfair practice affecting commerce', has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'this power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise' ".

While it is true that the Court in its opinion in the *Myers* case discussed the application and effect of the rule that no one was entitled to judicial relief until he had exhausted his administrative remedy, it is respectfully urged that the language of the Court with respect to the availability of the administrative remedy is dictum. For if, as the Court held, the National Labor Relations Act itself stripped the district court of all jurisdiction with respect to any unfair

labor practice affecting commerce, it is difficult to understand how the district court would have jurisdiction or power to exercise a judicial or legal discretion or to apply a judicial concept.

The same is true of the *Waterman* case, wherein this Court observed, "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have *exclusive* jurisdiction to decide questions of fact and law, which latter include the issue raised here whether the contracts in question are subject to the Act". (Emphasis supplied).

However, in contending (Pet. Br., p. 19) that the decision of the court below does violence to the exhaustion rule and in asserting that under a statute such as that involved here the rule rests not only upon the principle of "judicial administration" but also upon "the specific statutory scheme providing for an administrative determination of all matters in the first instance", Petitioners may not be making the argument dealt with above but may be arguing that the exhaustion rule is applicable here on the ground (among others) that the method of review prescribed by Section 313(b) of the Federal Power Act (which section is set forth in part in footnote 8 to the opinion of the court below; R. 55) is the only permissible method of review under the Act. If this is Petitioners' contention, that argument was forcefully disposed of by the court below. In that connection, the court below said (R. 55-56, 60-61):

> "This argument is valid of course with reference to orders issued by the federal commission concerning the form of accounts to be kept, concerning accounting practices and procedure, and concerning the disposition of amounts in various numbered accounts, because such orders may be reviewed only in the way the statute permits. It must indeed be admitted to be a valid argument concerning any actual exercise of the federal commission of supervisory control over utility accounting books and records.

"But the argument is not valid here, because it misses the actual point involved. It ignores the fact, which has been pointed out earlier in this opinion, that this case does not have to do with bookkeeping entries or accounting problems as such, and that the complaint in this case does not seek a judicial review of the manner in which the Federal Power Commission has exercised regulatory control over the company's accounting records.

"It is plain, therefore, that the contention of the federal commission to the effect that only its final orders may be reviewed, and then only by the exclusive method of appeal provided by the statute, overlooks the real nature of the controversy as we view it. For, as said before, this appeal is not concerned with the propriety of an actual order of the federal commission concerning the classification or treatment of accounts; it involves only the purely legal problem of determining, after considering together the applicable state and federal statutes, whether the federal commission or the state commission has the exclusive right to control the official accounting records of the company. It is alleged that both commissions claim to have that exclusive right, so this case involves only the search for the proper lodgement of the power of control, and has nothing to do with the manner in which the right of control has been or may be exercised by either commission.

"As we have pointed out heretofore, if the record shows both commissions to be claiming to have the sole power and authority of supervisory and regulatory control over the official accounting records and methods of the company, an actual controversy was presented; and it was the right and duty of the District Court to take cognizance of it for the purpose of construing the statutes of the two sovereignties, and then to say authoritatively which commission, under the harmonized statutes, has the regulatory power which both assert, and which only one can exercise."

* * * * * *

"* * * the basic power of the court certainly includes an interpretation of statutes such as is involved in the

present situation, unless that authority is cut off by the method of review of Federal Power Commission orders afforded by the Power Act. It is our view that the fundamental jurisdiction of the District Court to decide a case such as this, which involves no review of a Commission order, is not affected by the exclusive appellate procedure of the Federal Power Act."

* * * * * *

"This conclusion is not in derogation of the exclusive method of review stipulated in the Federal Power Act, as we have already pointed out. As the federal commission has made no final order, there is nothing from which an appeal could be taken by the company *under the statutory scheme of appeal.*" (Emphasis supplied.)

In summary, the Federal Power Act does not provide that the Federal Power Commission shall have exclusive jurisdiction to interpret the Act or to decide questions of jurisdictional conflict with state authorities arising thereunder. As the court below indicates, this case is wholly beyond the administrative-procedure-plus-review framework of the Federal Power Act and could not have been contemplated by the Congress when the statutory scheme was provided. Hence, the question presented for decision is not controlled by the Act itself or by the *Myers* or *Waterman* cases, *supra.*

Since there is here no controlling statutory provision requiring the legal issues raised by the Complaint to be passed upon exclusively and in the first instance by the Commission rather than the courts and preventing the District Court, rather than the designated reviewing courts, from passing upon them, whether the District Court should have taken jurisdiction to decide those questions must be determined by resort to the judge-made doctrines outlined above, i.e., the doctrine of prior resort and the doctrine of exhaustion of administrative remedies.

Doctrine of Prior Resort

As stated above, the doctrine of prior resort is commonly said to have had its inception in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), *supra*. There a shipper brought suit in the State courts for reparations for allegedly unreasonable rates charged by the railroad company. No prior application for relief had been made by the shipper to the Interstate Commerce Commission. The defense by the railroad was based upon the assertion that the Interstate Commerce Act by implication barred a remedy in the courts until the Commission had first been permitted to pass upon the case. This Court held that the defense was sound, that the need for uniformity in the fixing of railroad rates was paramount, and that such need warranted the Court in construing the Interstate Commerce Act to require by implication that all questions concerning the reasonableness of rates must be submitted to and decided by the Commission in the first instance.

However, where these considerations are not present, the rule is not invoked. In *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), a shipper brought suit in a State court seeking to recover from the railroad company a certain sum alleged to have been exacted in violation of Rule 10 of the carrier's tariff. The shipper contended that the case was within an exception to said Rule. Hence, as this Court pointed out, whether the charge was payable "depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied". In the lower courts the carrier had contended that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. This Court felt the issue before it to be whether *any court* had jurisdiction of the controversy in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction. In holding that prior resort to

the Interstate Commerce Commission was not necessary, Mr. Justice Brandeis, speaking for the Court, said, at page 291:

"Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but *the character of the controverted question and the nature of the inquiry necessary for its solution.* To determine what rate, rule, or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.* But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

* * * * *

"* * * *Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion.* The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and *preliminary resort to the Commission was, therefore, unnecessary.*" (Emphasis supplied).

The judgment of the lower courts in favor of the shipper was accordingly affirmed.

For other instances wherein prior resort to the Commission was held unnecessary, see the cases cited in footnote 2 to the Court's opinion in the case just discussed, 259 U. S. at page 295. See also *American Ry. Express Co.* v. *Price Bros.*, (C.C.A. 5th, 1931) 54 F. (2d) 67; compare *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), *supra.*

Doctrine of Prior Resort Not Applicable Here

In the instant case, the Complaint states a three-way controversy which arises out of conflicting claims of the Federal and State Commissions as to which has the exclusive and paramount authority to regulate the Company's official corporate accounts, sometimes referred to by the Federal Commission as "corporate accounts", "fundamental or basic corporate accounts", "fundamental corporate books of account", or "basic corporate books of account." See *In the Matter of Northern States Power Company, supra.*

The Federal Commission's claim is based upon Section 301(a) of the Federal Power Act and the claim of the State Commission is based upon the proviso clause of that Section and the laws of the State of Arkansas.

Section 301(a) of the Federal Power Act requires public utilities and licensees to keep such accounts and records as the Federal Commission may require for the purposes of its administration, subject to the proviso clause, which modifies this general grant and withholds from the Federal Commission authority over such accounts as a public utility is required to keep under and by authority of the laws of Arkansas. Sections 8(c) and 22(a) (Appendix C to this brief) of the Arkansas Act empower the Arkansas Commission to make reasonable rules pertaining to the account-

ing of public utilities operating in Arkansas, to establish uniform systems of account to be kept by utilities subject to the jurisdiction of the Commission and to prescribe the manner in which public utility accounts shall be kept.

The solution of the conflict between the two Commissions in no respect involves the weighing and balancing of evidence or the exercise of administrative discretion. Neither does it call for technical skill. It involves only the interpretation of Section 301(a) of the Federal Power Act, plus the determining of what the laws of the State of Arkansas require and the reaching of a conclusion as to the effect of such State legislation on the authority of the Federal Commission under the express provisions of the Federal Power Act.

This Court, in *Stark* v. *Wickard*, 321 U. S. 288, 309-310 (1944), held:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. * * * The responsibility of determining the limits of statutory grants of authority in such instances *is a judicial function* entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." (Emphasis supplied.)

This rule was recognized in *Dismuke* v. *United States*, 297 U. S. 167, 172 (1936), where the Court held:

> "But, in the absence of compelling language, resort to the courts to assert a right which the statute creates [recognizes] will be deemed to be curtailed only so far as authority to decide is given to the administrative officer."

This is a clear recognition of the power of the courts and a statement of their responsibility to determine whether an agency is exercising power beyond that fairly granted, as

well as a declaration that such a determination is a judicial —not an administrative—function.

The question is: Which Commission has the authority they both claim? And its complete answer is to be found within the four corners of the Federal Power Act and its legislative history and in the Arkansas statute.

The language of Section 301(a), including the proviso clause, is free from ambiguity and does not call for any construction. If, however, construction is necessary, the intent and purpose of Congress in inserting the proviso clause in that Section, as well as the meaning and effect of such clause, may be clearly established by reference to the Congressional policy underlying the enactment of the amendments to the Federal Power Act which included Section 301(a).

The legislative history of these amendments has been discussed several times by this Court, most recently in *Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 525-527 (1945) *supra*, where Mr. Justice Jackson, speaking for the Court, said:

> " • • • As frequently is the case, this original bill was drafted by the counsel and aides of the agency concerned. In its support Commissioner Seavey of the Federal Power Commission said to the House Committee, 'The new title II of the act is designed to secure coordination on a regional scale of the Nation's power resources and to fill the gap in the present State regulation of electric utilities. It is conceived entirely as a supplement to, and not as a substitution for, State regulation.' Progress of the bill through various stages shows constant purpose to protect rather than to supervise authority of the states. In reporting a revised bill to the Senate the Committee on Interstate Commerce said, 'Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory

powers, but not to impair or diminish the powers of any State commission.' The Report of the House Committee on Interstate and Foreign Commerce in presenting the amended bill * * * said:

'The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges . . . The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.'

* * *

"The policy declaration that Federal regulation is 'to extend only to those matters which are not subject to regulation by the States' is one of great generality.[12] It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose. But such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provi-

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[12] See in this connection the following excerpts from the address of Andrew R. McDonald, President of the National Association of Railroad and Utilities Commissioners before the 1935 annual meeting of that Association:

"The [Federal Power] Act contains the provisions, usual in regulatory acts, authorizing the Commission to prescribe accounts to be kept by the utilities subject to regulation. *To guard against the possibility that this power might be exercised to interfere with the keeping of accounts prescribed by State commissions,* we asked for and obtained the inclusion of the following express language in Section 301 (a):

"'*Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State.'

* * * * *

"* * * I have rehearsed these provisions because of the great importance of this Act, and because great concern was felt while the Act was before Congress lest the Act should be passed in such form as to encroach upon State regulation." (Emphasis supplied).

sions which purport to carry out its intent. It cannot wholly be ignored.

> "The declared purpose might also be looked for in specific denials of power to the Commission, such as that found in § 204(f), which provides that its controls, relating to issuance of securities, shall not extend to a public utility operating in a state under the laws of which its securities are regulated by a state commission."

The Company submits that, just as jurisdiction over the issuance of public utility securities is withheld from the Federal Commission when that jurisdiction is exercised by a State Commission, Congress intended to withhold from the Federal Commission regulatory power and authority over all *"accounts", "memoranda"* or *"records"* of a public utility which the laws of a State prescribed or authorized its Commission to prescribe. Here the State of Arkansas and its Commission have prescribed the manner in which the Company must keep its basic *"corporate books, accounts, and records"* and have designated the books so prescribed as its *"official corporate accounts and records"*.

It is self-evident that accounts and records would not and could not be kept *"by or under the authority of the laws of a State"* if the Federal Commission or any other Federal authority has any power or authority to direct, dictate or coerce the making of any entries therein or the disposition of any of the amounts therein established. Therefore the conflict in the case at bar can be resolved only by determining which Commission *under the law* has regulatory control over the accounts in question.

Again we wish to call attention to the fact, which was noted by the court below, that "the complaint does not challenge the correctness of, or justification for, any order of either commission with respect to the manner of recording transactions on the company's books, or the allo-

cation of items among prescribed accounts, or the disposition of amounts recorded in various accounts." (R. 48)

It is respectfully reiterated that the issues in the case at bar are *not issues involving questions of fact or discretion in technical matters, requiring for their solution knowledge commonly found only in a body of experts, but are purely legal questions with which the courts are more competent than the administrative agency to deal, and should be settled by the courts.* Hence there is no necessity here for prior resort to the administrative agency concerned. Incidentally, there certainly is nothing in the legislative history of the Federal Power Act to indicate any Congressional intent that the Federal Commission itself should first pass upon such patently legal questions as are here presented.

Petitioners take the position that the decision of this Court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946, is in effect a holding that the Federal Commission has the power to decide the legal question of what the Arkansas law requires and therefore is controlling here. But the *First Iowa* case, which does not involve the application of the "exhaustion" principle, is so clearly distinguishable from the case at bar that its rule should not even influence, much less control, the decision here. In the *First Iowa* case, this Court held that the State statutes requiring the issuance of a State permit to construct a hydroelectric project, before the Federal Commission could grant a license, were superseded by the Federal Water Power Act. Therefore it was not necessary for the Federal Commission to construe the Iowa statutes, since the State law could not have the effect (as in the case at bar) of conferring upon any State authority jurisdiction sought to be exercised by the Federal Commission.

In the case at bar, however, the situation is entirely different. Here the conflict between the two Commissions as

to which has control over the Company's official corporate accounts cannot be determined, as the conflict was held to be determinable in the *First Iowa* case, by the construction and application of the Federal Act alone. Section 301(a) of the Federal Power Act upon which Petitioners rely as giving them power over the Company's official corporate accounts does not even purport to override or supersede any State law or to strip the States of any of their power over any accounting or accounting records of a public utility. To the contrary, Congress was careful to leave the States unmolested with respect to such accounts and records as they might require a public utility to keep. Therefore, the application and effect of Section 301(a) of the Federal Power Act cannot be determined without first determining what the State law requires.

Doctrine of Exhaustion of Administrative Remedies

It is next necessary to turn to the doctrine of exhaustion of administrative remedies. As stated above, this doctrine appears first to have been announced in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 230, 232 (1908), *supra*. This suit involved a rate order entered by the State Corporation Commission of the State of Virginia. Under the Virginia Constitution, any person aggrieved by such an order had the right to appeal to a State court, and, on such appeal, the State court performed essentially administrative or legislative functions, having the power to substitute for the Commission's order "such order as, in its opinion, the Commission should have made". Without first appealing to the State court, plaintiff brought suit in the Federal courts to enjoin the enforcement of the Commission's order, alleging that the rates fixed thereby were confiscatory. Mr. Justice Holmes, speaking for this Court, posed the question whether "considerations of comity and convenience" did not require the Federal courts to refrain from interfering with State action until the remedies afforded by the State

had been exhausted. This question was thought to be one of "equitable fitness and propriety". The Court said:

> "The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action [in making the rate order], would not respect what they think their rights to be, before resorting to the courts of the United States."

Some question was raised whether, under the Virginia statutes, the time for an appeal to the State court might not have lapsed. In response to this contention, the Court said:

> "* * * As our decision does not go *upon a denial of power* to entertain the bills at the present stage, but *upon our views as to what is the most proper and orderly course in cases of this sort when practicable,* it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again." (Emphasis supplied).

Thus the two primary reasons for the adoption of the rule requiring exhaustion of administrative remedies, as set forth in the case in which the rule first was announced, apparently were the desire to extend comity and to insure orderly administrative procedure, unburdened by undue interference on the part of the courts. The fact that allegedly erroneous administrative action often was attacked

by suits in equity to enjoin such action also undoubtedly had a bearing upon the development of the exhaustion doctrine. If administrative remedies had not been exhausted, it was sometimes said or intimated that there was no showing that the remedy at law was inadequate, and that, if the administrative agency had not acted finally, there might be no threat of irreparable injury. See, for example, *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 (1937); *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (1945).

On whatever ground the doctrine is placed, it seems clear that, in the absence of statutory provisions providing otherwise, it is discretionary with the courts whether to require exhaustion of administrative remedies, since the doctrine, as developed by the courts, is essentially judge-made, springing from judicial self-restraint and self-limitation. See the *Prentis* and *Slattery* cases, *supra*.

Hence, if other considerations are deemed more important than the requirement of exhaustion, the rule will not be invoked. See, for example, *Oklahoma Natural Gas Company* v. *Russell*, 261 U. S. 290, 293 (1923). In that case, plaintiffs' application to the State Corporation Commission for higher rates had been denied. As in the *Prentis* case, the State Constitution gave an appeal to the Supreme Court of the State, which court had power both to substitute an order different from that entered by the commission and to grant a supersedeas in the meanwhile. Appeals were taken to the State court and supersedeas was applied for but refused. After supersedeas was denied by the State court, suit was brought in the Federal courts seeking to enjoin the action of the Commission in denying the application for increased rates. Applications for temporary injunctions were denied on the authority of the *Prentis* case. On appeal to this Court, Mr. Justice Holmes said:

> "If the supreme court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost

before the court shall have acted. * * * In such a state of facts, Prentis v. Atlantic Coast Line Co. has no application. See Love v. Atchison, T. & S. F. R. Co., 107 C. C. A. 403, 185 Fed. 321, 324, 325. *Rules of comity or convenience must give way to constitutional rights.*

* * * * *

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has as yet not been considered, the cases should be remanded to that court, with directions to proceed to the trial." (Emphasis supplied).

For other cases similar to the *Russell* case, see *Pacific Telephone & Telegraph Co.* v. *Kuykendall,* 265 U. S. 206 (1924); *Mountain States Power Co.* v. *Public Service Commission,* 299 U. S. 167 (1936); compare *Porter* v. *Investor's Syndicate,* 286 U. S. 461 (1932).

Doctrine of Exhaustion of Administrative Remedies Should Not Be Applied

The doctrine of exhaustion of administrative remedies should not be applied in the instant case. As has been pointed out, in the absence of statutory provisions controlling the matter, whether this doctrine should be applied rests in the sound discretion of the courts. And, in the instant case, it is respectfully urged that the exhaustion principle should not be applied; to the contrary, if the District Court's discretion had been properly exercised, the relief asked would have been granted. Here again, the *Myers* and *Waterman* cases, upon which Petitioners rely so heavily, are distinguishable from the case at bar. In those cases, even if statutory provisions had not been controlling, there probably was reason for the application of the exhaustion doctrine. In the first place, those cases involved factual questions within the technical competence of the administrative agencies concerned, while in the instant case no factual determination is required to settle the conflict pre-

sented. Secondly, the questions involved in those cases were merely ones of a proper and desirable allocation of power between *court* and *commission*. Here the issue is the proper allocation of power by the court between *commission* and *commission*, with the Company (a) left uncertain by the Federal Commission's deliberate failure to resolve the conflict, (b) at a loss as to its proper course of action from day to day, (c) subject to certain criminal sanctions, and (d) faced with the necessity of going into a burdensome hearing in which its position will be uncertain. The Company would obviously be at a disadvantage during any hearing before the Federal Commission if at that time the conflicting claims as to jurisdiction were not settled. While these considerations may not be controlling, they should have moved the District Court, in the exercise of its sound discretion, to settle the legal question and resolve the dilemma, especially since there was no impelling reason why it should not have taken jurisdiction to decide the matter. Since the question presented for decision is not one requiring for its solution informed, expert, administrative knowledge or the exercise of administrative discretion, the District Court should not have considered that it was "intruding" upon the administrative province on this score. Further, the fact that a court, rather than the Federal Commission, decides the issue will not interfere with effective regulation. The fact that a court takes jurisdiction to settle the matter will not lead to lack of uniformity of treatment over the subject matter; on the contrary, an authoritative determination of the question at this time will resolve doubts in the administration of the Federal Power Act, and the Act, as so interpreted, will be equally applicable to all litigants standing in the same position as the Company. Hence, there is no reason why the District Court should not have taken jurisdiction to decide the issues raised by the Complaint. Rather, in view of the impossible position in which the Company finds itself, there is every reason why such jurisdiction should have been entertained.

In short, since in this case there is no statutory inhibition against court action, and since the rule requiring exhaustion is one of discretion based on judicial self-restraint which is not appropriate here, considerations of comity and orderly administrative procedure should give way so that the serious dilemma in which the Company finds itself may be resolved. Thus the District Court should have taken jurisdiction to settle the questions involved.[13]

Administrative Remedy Afforded by Act Inadequate

As indicated above, due to the fact that suits in equity were often brought to enjoin administrative action, it was sometimes said that unless the plaintiff had exhausted his administrative remedies there was no showing that there was an inadequate remedy at law and hence failure to exhaust administrative remedies was felt to be a bar to the relief sought. This reasoning, however, has no place in a declaratory judgment proceeding. As stated by Professor Borchard in his work on Declaratory Judgments (2nd Ed., 1941), pp. 341, 342:

> "To conceive of the declaratory judgment as if it were an extraordinary remedy, or even an equitable remedy like injunction, not grantable when an ordinary or legal remedy is available, involves serious error. It is not supported by history or sound precedent, and its perpetuation by further decisions would impair the valuable social functions which the declaratory judgment was designed to perform. It allows improper technicalities to defeat the administration of justice."

However, even if it is said that a declaratory judgment is not grantable if an adequate administrative remedy is available, that rule or supposed rule does not operate to bar relief here. The only administrative remedy pointed

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[13] The Attorneys General, in their brief *amici curiae*, present further arguments why the exhaustion doctrine is not applicable here and why the *Myers* and *Waterman* cases are distinguishable from the case at bar.

out by Petitioners as being available to the Company is that afforded by the Federal Power Act. The inadequacy of this remedy in the present situation has already been indicated. Further, the Federal Commission (a) has not been empowered to construe and determine the requirements of the Arkansas law, (b) has not been empowered to restrain the State Commission from prosecuting the Company, as it has threatened to do, if it (the State Commission) has the authority it asserts and has exercised over the Company's accounting records, (c) does not have jurisdiction over all necessary parties in that it can not restrain or otherwise bind the State Commission and (d) did not constitute a proper forum in that the Company could not make the State Commission a party, nor could the latter intervene as a matter of right.

Petitioners (Pet. Br., p. 27) cite various cases in support of their theory that the States are bound by administrative procedure provided by the Congress and are required to follow it to the same extent as private litigants. But the cases relied upon (with the possible exception of one, which will be discussed later) did not involve a contest between a State and a Federal agency over the right of the State to exercise a sovereign power expressly recognized and confirmed in the State by the Congress.

The possible exception noted is the case of *Wisconsin Public Service Commission* v. *Federal Power Commission* (C.C.A. 7th, 1945), 147 Fed. (2d) 743. This was a proceeding for the issuance of a license under the Federal Power Act. The Wisconsin Commission intervened and contended that the stream upon which the project was to be constructed was not navigable and that, therefore, the Federal Commission had no jurisdiction. That case, unlike that at bar, involved a factual determination with respect to the navigability of the stream under consideration and for that reason clearly is distinguishable.

While the Federal Power Act provides that States and their agencies may complain to the Federal Commission, that provision has reference to complaints respecting derelictions of a public utility and does not contemplate that a State or its agency must first complain to the Federal Commission and there obtain a determination with respect to the Federal Commission's usurpation and exercise of powers conferred upon the State.

As disclosed by its Complaint, the Company is willing to follow either of the Commissions. Thus the litigation has, in effect, become a contest between the Federal and State Commissions as to which possesses the power they both claim, but which only one may exercise. It is respectfully submitted that the scheme of regulation and administrative procedure incorporated by the Congress in the Federal Power Act certainly does not afford an adequate and sufficient remedy for the solution of the conflicting claims of the two warring Commissions. Indeed, we repeat that this controversy obviously was not contemplated by, and is clearly beyond, the entire procedural scheme of the Federal Power Act.

Furthermore, a tribunal, although it may have jurisdiction of the subject matter, must also have jurisdiction of the parties to be affected by its order or judgment.

And the Federal Power Act and the rules of the Federal Commission provide no way whereby the Company could force the State Commission into the proceedings pending before the Federal Commission. The only way the State Commission could be made a party to the proceedings before the Federal Commission so as to become bound by its order was by voluntary intervention. The State Commission, under Section 1.31, page 3 of the Federal Power Commission's Rules of Practice and Regulation in effect at the time, could not intervene as a matter of right. Under this rule, it was discretionary with the Federal Commission

whether it would permit the intervention of any party, including a State, in proceedings before it.

Since this cause was dismissed by the District Court, the Federal Commission has amended the rule indicated, by giving to States and State agencies, as a matter of right, the privilege of intervention. This fact, however, cannot change the situation as it existed when the District Court dismissed the cause.

The rule seems to be well settled that a remedy "cannot be adequate if its adequacy depends upon the will of the opposing party." *Bank of Kentucky* v. *Stone* (C. C., D. Ky., 1898) 88 Fed. 383, 391. This language was quoted and approved by this Court in *American Life Insurance Company* v. *Stewart*, 300 U. S. 203, 215 (1937).

In the case of *Fredenberg* v. *Whitney* (D. C., W. D. Wash., 1917) 240 Fed. 819, 823, it was said:

> "In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment."

In this cause the Company has two adversaries—the Federal Commission and the State Commission. It rested wholly within the discretion of the State Commission whether it would intervene in the proceedings before the Federal Commission and it rested wholly within the discretion of that Commission whether it would permit the State Commission to intervene. Thus any remedy or relief which the Federal Power Act afforded the Company was entirely within the control of the Company's adversaries.

The Federal Power Act, under the circumstances disclosed by the record, does not afford the Company *any*, much less an adequate, remedy for the settlement of the

controversy here presented and the granting of the relief here sought.

In an effort to escape the legal issue here presented as to which Commission has control of the official corporate accounts of the Company, Petitioners suggest, if they do not actually urge, that if the Federal Commission is permitted to proceed with its hearing it might find a way of reconciling the conflict between the two Commissions and of recording disparate entries upon the same accounting records (Pet. Br., p. 22). It is also suggested that the issue presented may be avoided if the Federal Commission can work out a practicable method of accommodating the demands of the two agencies (Pet. Br., p. 27). These statements clearly imply that the two Commissions might reach an accord as to their conflicting claims and that the issues presented are factual, calling for an exercise of administrative discretion, rather than legal and thus calling for an exercise of the judicial function.

In making these statements, Petitioners are not only indulging in speculation, but are attempting to convert the issue presented for determination from one of law to one of fact.

In the first place, the record discloses that an attempt to settle the issue between the two Commissions by conference and negotiation has already resulted in failure (See paragraph (c) of show cause order, Pet. Br., p. 66). Second, the issue presented is not the reconciling of conflicting accounting entries, but is a legal conflict over which Commission, under the law, has exclusive control of the Company's official corporate accounts. Third, the Petitioners have taken the position in their brief that the Federal Power Act gives the Federal Commission exclusive jurisdiction over the records in question. But the State Commission has just as definitely taken the position that the law gives it exclusive control over the same records.

The law does not confer dual authority over those accounts of the Company which are kept under authority of state law or require the two Commissions to work out a method of dual control. If they were to attempt thus to accommodate their disparate demands, one or the other would surrender statutory authority in violation of law and the rights of the Company. The two Commissions can not work out any lawful agreement whereby one will give up authority conferred upon it by statute and defer the exercise of that authority so surrendered to the other Commission, upon which such authority was *not* conferred by statute. Neither Commission has the power to surrender its lawfully conferred authority to the other. Such an arrangement, in addition to being unlawful, would leave the Company in the most serious dilemma. It could not make an entry in its official corporate accounts with any assurance whatever that it would not be violating the law. Such an agreement between the two Commissions would not be binding and might be reversed whenever the personnel of either Commission changed.

On page 26 of their brief, Petitioners in effect say that this Court in the *Northwestern Electric Company* case, *supra*, held that the Federal Commission has the exclusive jurisdiction now claimed by both Commissions. This contention is made notwithstanding the fact that, in the *Northwestern* case, the Court did not discuss or determine the force and effect of the proviso clause of Section 301(a) of the Federal Power Act. But it is tantamount to a declaration by Petitioners that Congress has charged the Federal Commission with the duty of regulating the accounts in question. To reach the conclusion that the State Commission had the exclusive power both Commissions claim would, under the Federal Commission's interpretation of the *Northwestern* decision, be a failure on its part to carry out a mandate of Congress.

To say the least, the position taken by Petitioners forecloses any possibility whatever that the Federal Commission might conceivably hold with the State Commission. Indeed, the mere assertion of such a possibility goes beyond the speculation sometimes sanctioned in argument.

III

The Federal Declaratory Judgment Act Provides the Appropriate Remedy for the Relief Sought By the Complaint

The pertinent part of the Federal Declaratory Judgment Act reads as follows: (the full Act is found in Appendix A to this brief).

> "(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

The Declaratory Judgment Act is an important development in procedural law and should be liberally construed, *Maryland Casualty Co.* v. *Boyle Const. Co.* (C.C.A. 4th, 1941), 123 F. (2d) 558, 565. The statute must be liberally construed to attain its objective, which is to expedite and simplify the ascertainment of uncertain rights, *Ohio Casualty Ins. Co.* v. *Marr* (C.C.A. 10th, 1938) 98 F. (2d) 973, 975.

In providing the remedy of a declaratory judgment, it was the Congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him

an early adjudication without waiting until his adversary should see fit to begin suit, *Dewey & Almy Chemical Co.* v. *American Anode Inc.* (C.C.A. 3rd, 1943) 137 F. (2d) 68, 69. The trend of cases dealing with declaratory judgments is to extend their benefit to parties whose interests are challenged or are in jeopardy even before a right of action exists or a cause of action accrues. The Declaratory Judgment Act is procedural and its purpose is to adjust controversies which are *in esse* but not actually crystallized in litigation. *Ohio Casualty Ins. Co.* v. *Maloney* (D.C., E.D. Pa., 1942), 44 F. Supp. 312, 314.

In *Purcell* v. *Summers* (C.C.A. 4th, 1942) 126 F. (2d) 390, 394, the circuit court dealt with an application under the Declaratory Judgment Act for a judgment declaring the legality of the union of several branches of the Methodist Church and the propriety of granting relief under the statute. The court said: "The federal courts represent the sovereignty to which all of the parties to the controversies owe allegiance, which is not true of any state court that might be selected; and the broad power of the federal courts with respect to declaratory judgments is especially suited to the settlement of a controversy of this character between Christian people, who are seeking, not strife, but a final adjudication of rights by which they may abide. The declaratory judgment will expeditiously determine a fact or status 'on which a whole complex of rights may depend'. It will remove uncertainty and insecurity from the legal relations involved and thus 'clarify, quiet and stabilize them before irretrievable acts have been undertaken'," citing Borchard, Declaratory Judgments (2d Ed., 1941), pp. 283-284. See also *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local #123,* (C.C.A. 5th, 1943), 137 F. (2d) 176, 179, affirmed 321 U. S. 590 (1944).

In *Mississippi Power & Light Co.* v. *City of Jackson* (C.C.A. 2d, 1941) 116 F. (2d) 924, 925, the circuit court, discussing the remedy provided by the Declaratory Judgment

Act, said: "While the declaratory judgment act has not added to the jurisdiction of the federal courts, it has added a greatly valuable procedure of a highly remedial nature. Extending by its terms to all cases of actual controversy 'except with respect to Federal taxes', it should be, and it has been given a liberal construction and application to give it full effect. *Currin* v. *Wallace*, 306 U. S. 1 * * * presents a striking instance of its use in a suit between tobacco warehousemen, auctioneers and the Secretary of Agriculture, to determine the constitutionality and effect of the Tobacco Act of August 23, 1935, 7 USCA 511, et seq."

Many other citations might be offered giving the courts' views of the purpose, construction and application of the Federal Declaratory Judgment Act, but to do so would unduly extend this brief. It is urged again that the Federal Declaratory Judgment Act is highly remedial and should receive construction and application by the courts in keeping with the intent of Congress in enacting it, which was to enable parties having a real controversy to settle the same before blood is shed, damages have accrued or penalties have attached.

Uncertainty as to Jurisdiction Affects Company's Rights

The uncertainty as to which Commission has jurisdiction over the Company's official corporate accounts unquestionably will affect the course of the hearing before the Federal Commission, when that hearing is held. If the adjustments ordered by that Commission are not to be recorded upon the Company's official corporate accounts, its course will no doubt be different from what it would be if they are to be so recorded. Until the Company knows who its accounting master is, it must be careful not to do, or propose to do, anything which might violate the State Commission's order. In a hearing before the Federal Commission, the Company cannot lose sight of the fact that the State Com-

mission has threatened to prosecute it if that Commission's orders are violated. The Company cannot have as free a hand in the presentation of its cause before the Federal Commission as it would have if it knew who had control of its accounting records. On the other hand, if the State Commission does not have the jurisdiction claimed by it, the Company will be free fully to develop its case before the Federal Commission without regard to what the State Commission may have done or threatens to do. The Company has the "right to raise the issue as to whether [its] conduct does or does not violate the criminal law and affect [its] property rights [and] is not required to wait indefinitely under suspension, • • • " *Sunshine Mining Co.* v. *Carver* (D. C., N. D. Idaho, 1941), 41 F. Supp. 60.

As this Court said in *Terrace* v. *Thompson*, 263 U. S. 197, 216 (1923), "They [parties] are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights."

Furthermore, as the court below held:

> "Existence of another route to the same goal does not preclude a litigant from invoking the Declaratory Judgment Act" (R. 62). See particularly the authorities collected in Note 19 of the Court's opinion (R. 62).

Among the authorities cited by the court below is Rule 57, Federal Rules of Civil Procedure. (28 USC following Section 723(c)). This rule in part reads, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate". This rule has been construed and applied in a number of cases. See *Delno* v. *Market St. Ry. Co.* (C. C. A., 9th, 1942), 124 F. (2d) 965, 968; *Dominion Electrical Mfg. Co.* v. *Wiegand* (C. C. A. 6th, 1942), 126 F. (2d) 172, 173; *Employers' Liability Assur. Corp. Ltd.* v. *Ryan* (C. C. A. 6th, 1942), 109 F. (2d) 690.

In *Chicago Metallic Mfg. Co.* v. *Edward Katzinger Co.* (C. C. A. 7th, 1941) 123 F. (2d) 518, 519, the Circuit Court held, "While it is true that granting of the remedy [a declaratory judgment] is discretionary with the court and may be refused if it is being sought merely to determine issues involved in a case already pending, the mere pendency however, of another suit between the parties without more, is no basis for refusing a declaration. *Columbian Nat. Life Ins. Co.* v. *Foulke*, 8 Cir., 89 F. (2d) 261 and *Maryland Casualty Co.* v. *Consumers Finance Service*, 3 Cir., 101 F. (2d) 514. 'It is only where the court believes that more effective relief can and should be obtained by another procedure and for that reason a declaration will not serve a useful purpose, that it is justified in refusing a declaration because of the availability of another remedy.' Borchard, Declaratory Judgments, 1934, p. 110."

The foregoing authorities, together with those cited in note 19 of the opinion of the Court of Appeals, are clearly to the effect that a District Court may not refuse relief under the Declaratory Judgment Act merely because of the pendency of another suit or the availability of another remedy. Especially is that true when, as here, (a) the adequacy of the other remedy is questionable, (b) the power of the other tribunal to pass upon the issues involved is uncertain, (c) it appears that full and complete relief may not be granted, or (d) the relief offered by the other remedy may not settle all of the issues involved.

Conclusion

In conclusion, the Company respectfully submits:

(1) That the District Court had jurisdiction of the subject matter of the Complaint and should have granted the relief sought by answering a legal question, i.e., which of the two Commissions has jurisdiction over the Company's official corporate accounts?;

(2) That the failure of the Company to exhaust a supposed or assumed administrative remedy did not justify the District Court in refusing to grant the relief sought, particularly since the Federal Power Act itself did not afford the Company an adequate and sufficient remedy for the settlement of the irreconcilable controversy between the two Commissions;

(3) That, as the Court of Appeals held, "the present case presents an unusually appropriate opportunity for the exercise of the judicial function in the manner contemplated by the Congress when it enacted the Declaratory Judgment statute."; and

(4) That the judgment of the Court of Appeals remanding the cause to the District Court for further proceedings in conformity with the opinion of the said Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Declaratory Judgment Act

(49 Stat. 1027, Judicial Code, § 274(d), 28 U.S.C.A. 400).

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, § 274d, as added June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.)

APPENDIX B

Excerpts From the Federal Power Act

(49 Stat. 847, 854, 16 U.S.C.A. §§ 824, 825.)

§ 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution

to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. (16 U.S.C.A. § 824(a).)

§ 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof. (16 U.S.C.A., § 825(a).) (Emphasis supplied.)

§ 313. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of

the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). (16 U.S.C.A., §825 *l*.)

§ 315. (a) Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this Act or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this Act, or to appear by an officer or agent at any hearing or investigation in response to a subpoena issued under this Act, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this Act but such forfeiture shall be in addition to any such penalty. (16 U.S.C.A., § 825n (a).)

§ 316. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this Act, or any rule or regulation imposed by the Secre-

tary of War under authority of Part I of this Act shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (16 U.S.C.A., § 825o.)

APPENDIX C

Excerpts From Act 324 of the General Assembly of Arkansas (1935)

(Pope's Digest of the Statutes of Arkansas, §§ 2071, 2085, 2121, 2122.)

§ 8. (a) The Department herein created is hereby vested with the power and jurisdiction, and it is hereby made its duty to supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

(c) The Department is hereby empowered, after hearing and upon notice, to make, and from time to time, in like manner, alter or amend such reasonable rules pertaining to the operation, accounting, service and rates of public utilities, and of the practice and procedure governing all investigations by, and hearings and proceedings before the Department, as it may deem proper and not inconsistent with this Act.

§ 22(a). The Department, by order, may establish uniform system of accounts to be kept by any public utility subject to its jurisdiction, or may classify said public utilities and establish a system of accounts for each class, and the Department may prescribe the manner in which such accounts shall be kept.

§ 61. (a) Every public utility, and every person, or corporation, shall obey and comply with each and every requirement of this Act and of every order, decision, direction, rule or regulation made or prescribed by the Department in the matters herein specified, or any other matter in any way relating to or affecting the business of any public utility, and shall do everything necessary or proper in order to secure compliance with, and observance of, every such order, decision, direction, rule or regulation by all officers, agents, and employees of every public utility.

(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty of not less than $100 nor more than $1,000 for each such offense.

§ 62. Each violation of any of the provisions of this Act or of any lawful order or rule of the Department, or any part or portion thereof by any corporation or person, is a separate and distinct offense, and in case of a continuing violation after a first conviction each day's continuance thereof shall be deemed to be a separate and distinct offense.